



In the Matter of:

**MIDWEST FARMWORKER
EMPLOYMENT & TRAINING, INC.
(STATE OF MINNESOTA),**

COMPLAINANT,

v.

**UNITED STATES DEPARTMENT OF
LABOR,**

RESPONDENT.

**MIDWEST FARMWORKER
EMPLOYMENT & TRAINING, INC.
(STATE OF SOUTH DAKOTA),**

COMPLAINANT,

v.

**UNITED STATES DEPARTMENT OF
LABOR,**

RESPONDENT.

**MIDWEST FARMWORKER
EMPLOYMENT & TRAINING, INC.
(STATE OF NORTH DAKOTA),**

COMPLAINANT,

v.

UNITED STATES DEPARTMENT OF LABOR,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

**ARB CASE NOS. 99-007 and
99-058
(Formerly CASE NO. 98-144)**

ALJ CASE NO. 97-JTP-20

DATE: March 31, 1999

**ARB CASE NOS. 99-056 and
99-059
(Formerly CASE NO. 98-144)**

ALJ CASE NO. 97-JTP-21

**ARB CASE NOS. 99-057 and
99-060
(Formerly CASE NO. 98-144)**

ALJ CASE NO. 97-JTP-22

Appearances:

For the Complainant:

Larry Meuwissen, Esq., *Larry Leventhal & Associates, Minneapolis, Minnesota*

For the Respondent:

Stephen R. Jones, Esq., Harry L. Sheinfeld, Esq., Charles D. Raymond, Esq.
U.S. Department of Labor, Washington, D.C.

ORDER OF DISMISSAL

These three consolidated cases arise under the Job Training Partnership Act (JTPA), 29 U.S.C. §1501 *et seq.* (1994), and implementing regulations at 20 C.F.R. Parts 626-638 (1998).^{1/} Complainant, Midwest Farmworker Employment & Training, Inc. (“Midwest”), initiated these actions to reverse the Grant Officer’s award of funds to two other grant applicants for training migrant and seasonal workers in the states of Minnesota, North Dakota, and South Dakota.^{2/} Midwest’s challenge involved funding for the program years 1997 (July 1, 1997 through June 30, 1998) and 1998 (July 1, 1998 through June 30, 1999).^{3/}

After a hearing, the Administrative Law Judge (ALJ) issued a Decision and Order (D&O) in which he found that Midwest was not given a fair opportunity to compete for the grants in the three states. The ALJ ordered the Department of Labor to recompile the 1997-1998 grants for the three states and to reimburse Midwest for expenses related to its grant application and the hearing.

^{1/} These cases were consolidated first before the Administrative Law Judge. When initially appealed to this Board by the Department, they were docketed erroneously under a single case number, ARB Case No. 99-007. This ARB case number is now assigned to the Department’s appeal of ALJ Case No. 97-JTP-20, involving the Minnesota grant application. The Department’s appeal of the South Dakota grant application has been assigned ARB Case No. 99-056, and the North Dakota grant appeal has been docketed as ARB Case No. 99-057. After the initial appeals were filed, Midwest Farmworker Employment & Training, Inc., filed cross-appeals which have been docketed as ARB Case No. 99-058 (Minnesota), 99-059 (South Dakota), and 99-060 (North Dakota).

^{2/} For ease of reference, we refer to Minnesota, North Dakota, and South Dakota as “the three states.” The JTPA provision for migrant and seasonal worker programs is codified at 29 U.S.C. §1672 (1994).

^{3/} These cases were before us earlier on Respondent’s Request for Emergency Review of Denial of Motion for Protective Order and Grant of Motion to Compel Discovery. We denied the motion in an Order issued on July 23, 1998 in ARB Case No. 98-144.

Both Midwest and Respondent, the Department of Labor, filed exceptions to the ALJ's decision. We asserted jurisdiction in an Order issued October 23, 1998. We find that the ALJ's decision is moot, vacate it, and dismiss the complaints.

BACKGROUND

1. Regulatory Scheme

Competitions for grants under JTPA Section 402, providing funds for training migrant and seasonal workers, are conducted every two years. 29 U.S.C. §1672(c)(2). The applicable regulations are found at 20 C.F.R. §633.201 through §633.205.

Not all geographic areas are open to competition every two years. The JTPA provides, at 29 U.S.C. §1672(c)(2):

The competition for grants under this section shall be conducted every two years, except that if a recipient of such a grant has performed satisfactorily under the terms of the existing grant agreement, the Secretary may waive the requirement for such competition upon receipt from the recipient of a satisfactory two-year program plan for the succeeding two-year grant period.

Thus, at the discretion of the Secretary, an incumbent grantee with a successful record of performance may be eligible for a new grant without making a competitive application.

Applicants who intend to apply for the grant must file a Preapplication for Federal Assistance pursuant to 20 C.F.R. §633.202(b). The Department conducts a "responsibility review" to determine whether the applicant has established overall responsibility to administer federal funds. 20 C.F.R. §633.204.

The Department also reviews the applications under the criteria listed at 20 C.F.R. §633.203, one of which is "a familiarity with the area to be served." 20 C.F.R. §633.203(b). The reviewers recommend to the Grant Officer which applicant should be awarded the grant. The Grant Officer reviews the recommendations and makes an independent determination that the recommendations are correct. Grants are awarded only to applicants that have been found to be financially responsible. 20 C.F.R. §633.204(b).

The Grant Officer notifies unsuccessful applicants in writing. 20 C.F.R. §633.205(c). An unsuccessful applicant may request an administrative review before an ALJ for a determination "with respect to whether there is a basis in the record to support the Department's decision." 20 C.F.R. §633.205(e). However, the review does not interfere with the funding of the selected applicant. *Id.* Under such review, the only remedy that may be awarded to a successful complainant is "the right to be designated [grantee] in the future rather than a retroactive or immediately effective selection status." *Id.* The regulation goes on to state that toward the end of the funding period there will not be such a future designation:

Therefore, in the event the ALJ rules that the organization should have been selected and the organization continues to meet the requirements of this part, the Department

will select and fund the organization within 90 days of the ALJ's decision *unless the end of the 90 day period is within 6 months of the end of the funding period.*

20 C.F.R. §633.205(e) (emphasis added).

2. These Cases

Midwest was the long term incumbent grantee of JTPA Section 402 training funds for the three states, including the time the grants were competed in 1997. Beginning in 1995, the Department received reports from Midwest employees of personnel abuses, including coercion to make donations. Transcript of Hearing (T.) at 26. The Department's Office of Inspector General (OIG) investigated the allegations. D&O at 4. Notwithstanding the Department's earlier notification to Midwest that coerced fund-raising was not allowed under the JTPA, the practice had persisted. Department Exhibit (DOLX) 18. According to Midwest's Executive Director, Roberto Reyna, Midwest finally ceased raising funds from employees after a June 1996 notice from the Department. T. 429.

Several Midwest employees sent letters to the Department requesting assistance in obtaining refunds of the forced contributions. In November 1996 the Department directed Midwest to reimburse the employees. DOLX 4. The next month, the OIG alerted the Department that Midwest had discharged some employees allegedly because of their cooperation with OIG's ongoing audit of the organization. DOLX 5; *see also* DOLX 12. When the Department objected to the firings, Midwest reinstated the employees. DOLX 14.

On the basis of its investigation, the Department announced that Midwest had not performed satisfactorily for the program years 1995 and 1996 and issued a Solicitation for Grant Application (SGA)^{4/} inviting competition for the next two program years. Application of Waiver Provision and Solicitation for Grant Application (SGA), 62 Fed Reg. 6272-76, Feb. 11, 1997; *see* JTPA Section 402(c), 29 C.F.R. §1672(c)(2). Midwest remained eligible to compete for the 1997 and 1998 program year grants.

After receiving the applications for migrant and seasonal worker training grants for the 1997 and 1998 program years, a three member reviewing panel deliberated, rated the applications, and submitted its report to the Grant Officer. Based on the panel's scoring and geographic issues, the Grant Officer determined that applicant Motivation Education & Training, Inc. (Motivation), and not Midwest, was the best qualified to receive the grants for Minnesota and North Dakota and that a second applicant, Proteus, Inc., was best qualified for South Dakota. T. 54. Motivation and Proteus were awarded the grants.

^{4/} The SGA contained a typographical error that reduced from 25 to 15 the points available for "familiarity with the area to be served." This error had the effect of reducing the total rating points available to all applicants to 90, instead of 100. Because Midwest had provided training services within the grant areas for many years, the company presumably would have received a relatively high rating score under the "familiarity with the area serviced" criterion, and therefore Midwest would have been disadvantaged (relatively) by the reduction in value from 25 to 15 rating points.

Midwest sought administrative review and a hearing challenging its non-selection for these grants.^{5/} Midwest contested the Department's determination that it had not performed satisfactorily, claiming that the accusations of personnel abuses were not true. Midwest argued that the employees had not been required to follow existing complaint procedures that would have afforded it procedural protections. Finally, Midwest objected that the Department improperly had acted as an advocate for the complaining employees. Complainant's Brief (Comp. Br.) at 2-7, attached to Midwest Exceptions. Midwest asserted that it had performed satisfactorily and therefore should have had the benefit of a waiver of competition for the 1997-1998 program years.

Midwest also assailed the "prejudicial altering of the point totals available under the SGA," arguing that the alteration had harmed its chances of winning the grant. Comp. Br. at 7; *see also* n. 4, *supra*. It also contended that Charles Kane, the Director of the Division of Migrant and Seasonal Farmworker Programs at the Department, had an improperly close relationship with Motivation's Director, Frank Acosta, who had sent gifts of foodstuffs to Kane's home. Comp. Br. at 8. Although Motivation was not a party to the proceeding, Acosta submitted to the ALJ a written defense of Kane's conduct. *See* August 3, 1998 letter from Frank Acosta to the ALJ. Midwest argued that Acosta's letter documented further incidences showing the improperly close social relationship between Kane and Acosta. Comp. Br. at 8-9.

Finally, Midwest noted that a Motivation employee, Sammy Ibarra, had embezzled JTPA funds. Midwest argued that because of the embezzlement, Motivation was not a "responsible" entity within the meaning of the JTPA and could not lawfully receive a grant.

3. The ALJ's Decision

The ALJ found that the Department's decision not to waive competition, which caused Midwest to have to reapply for grants for the three states, was reasonable. D&O at 11. The ALJ relied upon evidence that 28 Midwest employees had provided information on abusive personnel practices, failure to pay overtime wages, and coerced contributions. *Id.* at 7. He also cited credible evidence of retaliatory discharge of Midwest employees who had given information to the OIG. *Id.*

The ALJ next turned to the evidence concerning Kane's relationship with Frank Acosta, the Director of Motivation. The ALJ agreed with Midwest's argument that Acosta's letter defending Kane's behavior "demonstrates that [the letter] was in fact solicited by Mr. Kane following his testimony." D&O at 10. The ALJ also found other evidence of an improper relationship between the Department and Motivation. He credited the testimony of a Midwest employee that Motivation offered her a job prior to the award of the grants to Motivation, and that someone at the Department of Labor told Motivation in advance that it would receive the grants. *Id.* at 10-11.

^{5/} The grant to Motivation for the state of North Dakota is also the subject of a second challenge currently pending before the Board, *Job Service North Dakota v. United States Dep't of Labor*, ARB Case No. 99-020, ALJ Case No. 97-JTP-23.

On the basis of an incident that occurred after the award of the grants at issue, the ALJ decried Kane's "prejudice" against farmworkers. D&O at 9-11. The ALJ also noted that the incident led to the removal of Kane from his position.^{6/} *Id.* at 10.

The ALJ examined evidence of financial wrongdoing on the part of Motivation. The ALJ found that the embezzlement of federal funds by Ibarra, who had been the manager of Motivation's office in Eagle Pass, Texas, was not an isolated incident. D&O at 11. The ALJ also stated that there was no evidence that the embezzled funds had been returned. *Id.*

The ALJ found that "a prudent grant officer" with knowledge of Kane's activities, Acosta's gifts, and Ibarra's embezzlement would terminate the grants to Motivation. D&O at 11. The ALJ further found that the reduction in point value for the criterion "familiarity with service area" compromised the grantee selection process. *Id.*

The ALJ found that the reviewing panel had formed an unbiased opinion of the strengths and weaknesses of the grant applications. D&O at 12. He also absolved Grant Officer DeLuca, who selected Motivation, of any knowledge of Acosta's gifts to Kane. *Id.* at 11-12. Nevertheless, the ALJ found that DeLuca had been given unspecified information by Kane, who had not disclosed to DeLuca his relationship with Acosta. *Id.*

Ultimately, the ALJ concluded that the selection of Motivation violated "ethical, statutory, and regulatory requirements" and overturned the grants to Motivation for training in Minnesota and North Dakota. D&O at 12. Although the ALJ acknowledged that there was no evidence that Proteus (the grantee for South Dakota) had engaged in any improper conduct, the ALJ nevertheless also overturned the grant to Proteus because Midwest "was not given a fair opportunity to compete." *Id.* As remedies, the ALJ ordered the Department to recompile the 1997-1998 Section 402 grants for the three states and to reimburse Midwest for its expenses related to the grant application and hearing. D&O at 13. The ALJ also found that Midwest was entitled to attorney fees and afforded it the opportunity to submit an application for such fees. *Id.* at 12.

DISCUSSION

The Department argues that the case is moot because the limited remedy under the applicable regulation, 20 C.F.R. §633.205(e), is no longer available, and because the ALJ erred in failing to order that Midwest should be the grantee for the 1998 program year. We agree.

The regulation governing administrative review of JTPA grant challenges contains a provision designed to avoid undue disruption of service to program participants within the two year grant period. Where an ALJ rules that a non-selected applicant should have been selected, the Department selects and funds that applicant so long as the 90-day transition period for the transfer of the grant will not end within six months of the end of the funding period. 20 C.F.R. §633.205(e). This regulation represents the Department's judgment that it would be too disruptive to change the

^{6/} Kane has since retired from the Department. T. 552.

grantee within nine months of the time that the grant funds expire. Significantly, transfer of the grant to the applicant not originally selected is the sole remedy available under the regulation. *Id.*

It is well established, pursuant to this provision, that appeals of non-selection for a training grant are moot where the ALJ has not ordered the only available relief – designation of a different applicant – within the first 15 months of the grant period. *See State of Maine v. United States Dep’t of Labor*, 770 F.2d 236, 239-40 (1st Cir. 1985) (under the Department’s regulation, a claim that the Department violated its own regulations in awarding a grant is moot once the grant period has ended); *Campesinos Unidos, Inc. v. United States Dep’t of Labor*, 803 F.2d 1063, 1069 (9th Cir. 1986) (“[I]t is clear that the regulation does not provide any remedy for an applicant improperly denied funding if the Department’s determination is not reached until the grant period is within nine months of its expiration.”)^{2/}; *North Dakota Rural Development Corp. v. United States Dep’t of Labor*, 819 F.2d 199, 200 (8th Cir. 1987) (same); *Lake Cumberland Community Svcs. Organization, Inc., v. United States Dep’t of Labor*, 929 F.2d 701, 1991 WL 43905 (6th Cir. 1991) (“[U]nless an unsuccessful applicant receives a final decision from either the Department of Labor or a Court of Appeals finding that the applicant was wrongfully denied the grant prior to nine months before the end of the funding period, the applicant has no remedy” and the case is moot); *see also Cherokee Nation of Oklahoma v. United States Dep’t of Labor*, ARB Case No. 98-153, ALJ Case No. 97-JTP-12, Order of Dismissal, Feb. 12, 1999, slip op. at 4 (under analogous provision of regulation governing the Indian and Native American Employment and Training Provisions of the JTPA at 20 C.F.R. §632.12(a)) and *Illinois Migrant Council v. United States Dep’t of Labor*, Case No. 84-JTP-10, Sec. Final Dec. and Ord., July 17, 1986, slip op. at 9-11 (case moot where the funding period had expired).

In this case, the ALJ ruled on September 19, 1998, that the Department should recomplete the process for these grants for the 1997-1998 program years. D&O at 13. Under the regulations, however, there was only one remedy available, so long as there were more than nine months remaining in the funding year: an order that Midwest be designated the grantee for the remainder of the program year. *See, e.g., Nebraska Indian Inter-Tribal Dev. Corp. v. United States Dep’t of Labor*, Case No. 87-JTP-19, Sec. Dec. and Ord. of Remand, slip op. at 10 (analogous provision governing JTPA Native American grants, 20 C.F.R. §632.12(a), “limits the available remedy in an appeal from denial of designation as a Native American JTPA grantee to the right to be designated in the future. The regulation sets a clear limit on the ALJ’s authority in a case of this kind.”).

In this case, fewer than four months now remain until the end of the 1998 program year on June 30, 1999. Even if this Board agreed with the merits of Midwest’s challenge, we would have

^{2/} The *Campesinos* decision involved an unsuccessful applicant’s challenge of grants for training migrant and seasonal workers during two distinct grant periods. The first of the two grant programs involved was authorized by the Comprehensive Employment and Training Act (CETA) and the second was authorized by CETA’s successor statute, the JTPA. At the time of the court’s decision, the grant periods had expired for both of the challenged grants. Relying upon the regulation at 20 C.F.R. §633.205(e), the Ninth Circuit found the controversy moot as to both of the challenged grants.

no authority under the regulations to issue a final decision designating a different grantee. For that reason, this case is moot.

Midwest contends, however, that the case is not moot because there is a reasonable expectation that the issue – the Department prevails simply through the passage of time – will arise again. Complainant’s Brief on Appeal (Appeal Br.) at 3-4. According to Midwest, the Department engaged in delaying tactics that prevented the ALJ from ruling sooner.

Both the Secretary and a court have rejected Midwest’s argument. In *Illinois Migrant Council, supra*, slip op. at 10-11, the Secretary found that where the funding year had expired, a non-selected applicant’s case did not come within the recognized exception of mootness for cases “capable of repetition, yet evading review.” The same analysis would apply near the end of the funding year.

There simply is no reason to assume that the same alleged intentional delay would arise in reviewing challenges by non-selectees in future years, as the Sixth Circuit found in *Lake Cumberland*, 1991 WL 34905 at **2 (“Petitioner contends that the Department of Labor intentionally delayed the review of its denial of the grant so as to deprive petitioner of any relief. Petitioner, however, cannot make a reasonable showing that it will again be subject to similar conduct by the Department of Labor.”). Moreover, in view of Kane’s prominence in the ALJ’s reasoning in these cases and the fact that Kane has retired, there is no reasonable basis to believe that Midwest would again be subjected to the conduct which Midwest alleges was prejudicial.

We recognize that the result that we reach, *i.e.*, dismissal, may seem harsh in these cases since “the availability of [the] remedy depends on the speedy processing of [the petitioner’s] appeal by the Department.” *Campesinos*, 803 F.2d at 1069. The petitioner in *Campesinos* encountered “inexcusable” delays in obtaining a final decision from the Grant Officer and an adjudication of its claims within the agency, but the Ninth Circuit nevertheless found that “it is an injustice that we could not remedy without doing a greater injustice.” 803 F.2d at 1071. This reasoning applies with equal force in this matter.

Midwest also argues that it should not be penalized because the ALJ “failed to implement the only remedy he is authorized to grant in these cases,” *i.e.*, providing funding to Midwest. Appeal Br. at 2. But even if we now held that the ALJ should have ordered the transfer of funding to Midwest, the passage of time has precluded us from being able to provide that remedy.^{8/}

^{8/} Because we dismiss this case as moot, it is unnecessary for us to reach any conclusions on the merits of the case. However, we note that even if the case were not moot, and even if the ALJ had awarded the proper remedy under the regulations, our doubts concerning several of the ALJ’s key findings of irregularities in the grant application process would compel us to reevaluate the ALJ’s conclusions. For example, the finding that Kane was “prejudiced” against farmworkers, discussed at length by the ALJ, was based upon comments he made at a meeting in Coeur D’Alene, Idaho, *after* the award of the grants at issue. Moreover, any purported prejudice against farmworkers on Kane’s part would apply equally to the successful applicant, Motivation, which also was operated
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8/ (...continued)

by farmworkers. The ALJ's questions at the hearing showed that he was aware that Midwest and Motivation were similar in nature:

Q by ALJ: [T]he other competing firm, [Motivation,] did they have any Chicanos working for them?

A: Yes, they did.

Q by ALJ: So how can you say it was – how can you say they discriminated against one Chicano when they gave a contract to another Chicano?

T. 489. Because Kane did not review the applications or select Motivation, Kane's alleged prejudice against farmworkers – which was an important element of the ALJ's analysis – seems irrelevant.

The ALJ also appeared to err in assessing the facts concerning the embezzlement of funds by one of Motivation's employees, Ibarra. After the ALJ raised questions at the hearing about the Ibarra incident, the Department reported that "the OIG is not aware of any evidence indicating that anybody within [Motivation] besides Mr. Ibarra was involved in" or "aware of" the embezzlement of JTPA funds, and that "Motivation officials were completely cooperative during the investigation of Ibarra's activities." Shapiro affidavit, attached to June 10, 1998 report to ALJ. Moreover, the Department explained that Ibarra had been ordered to pay restitution, *id.*, and the record contains a photocopy of the judgment in Ibarra's criminal case, noting that Ibarra had paid some \$14,052.80 in restitution. MX 1, Judgment, at pp. 2, 4. Notwithstanding this evidence, the ALJ curiously found that Ibarra's embezzlement of funds was not an isolated incident and that "there is no evidence that the embezzled funds were returned." D&O at 11. We question those findings.

We also question the ALJ's finding that Kane's alleged bias in favor of Motivation made the grantee selection process unfair, when the weight of the evidence suggests that the persons charged with conducting the review were free from bias. The selection process began when DOL employee Irene Pindle arranged for publishing the SGA for grants in the three states. T. 913. After publication, Pindle discovered the typographical error in the number of points allotted for "familiarity with area served." T. 914. The ALJ found that Pindle did not act with any bias. D&O at 11. Next in the grant application process, three panel members evaluated the grant applications. The chair of the panel, Roland Brack, testified that he had no conversations with Kane about the work of the panel. T. 881-882. Likewise, panel member Ronald Rubbin knew none of the applicants and believed the scoring process was done fairly. T. 999. After the panel made its recommendations, Grant Officer James DeLuca reviewed the recommendations and selected the grantees. The ALJ found that DeLuca did not act with prejudice and did not know anything about gifts from Acosta to Kane. D&O at 11.

Based on the record and the ALJ's findings, it appears that the people who actually
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Where, as here, a case has become moot because of circumstances unattributable to the parties, it is appropriate to vacate the ALJ decision. *Cherokee Nation*, slip op. at 4. See *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23 (1994) (“vacatur must be decreed for those judgments whose review is, in the words of [*United States v.*] *Munsingwear*[, 340 U.S. 36, (1950)] ‘prevented through happenstance’ – that is to say, where a controversy presented for review has ‘become moot due to circumstances unattributable to any of the parties. *Karcher v. May*, 484 U.S. 72, 82 (1987).”).

Accordingly, in view of the mootness of this case, the ALJ’s September 29, 1998, Decision and Order is hereby **VACATED** and this case is **DISMISSED**.^{9/}

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member

^{8/}(...continued)

performed the selection did not act with bias against the disappointed applicant, Midwest, or with bias in favor of the grantees, Motivation and Proteus. The ALJ simply did not explain how any prejudice or bias on the part of Kane affected the selection process conducted by Pindle, the panel members, and DeLuca.

^{9/} The ALJ appeared to authorize a future award of attorney fees to Midwest by affording it the opportunity to submit a petition for such fees. D&O at 12. The ALJ did not cite any authority for awarding fees under the JTPA or the implementing regulations, and we have found none.

In light of our disposition of this case, we need not rule on Midwest’s Motion to Strike Portions of Respondent’s Brief and Material Outside of the Record.